

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
(EASTERN DIVISION)**

LEVINE HAT CO., on behalf of itself and
 all others similarly situated,

 Plaintiffs,

 vs.

INNATE INTELLIGENCE, LLC et al.,

 Defendants.

Case No. 4:16-cv-01132-SNLJ

**PLAINTIFFS' STATEMENT OF ADDITIONAL
UNCONTROVERTED MATERIAL FACTS**

COMES NOW Plaintiffs, by and through their undersigned counsel, and states the following for their Statement of Additional Uncontroverted Material Facts in support of their Response in Opposition to Defendant ProFax's Motion for Summary Judgment:

36. ProFax is owned by Ralph Potente. *See* Ex. 5, Rule 30(b)(6) Deposition of ProFax, Inc.'s Corporate Representative Andrew Barnett, July 20, 2018, 12:19-24; 18:9-12.

37. Mr. Potente owns property in Palm Beach County, Florida and upstate New York.
See Ex. 6, Ralph Potente Facebook Profile;
<https://www.facebook.com/profile.php?id=100000627068768&lst=58702590%3A100000627068768%3A1543991551&sk=about§ion=bio>.

38. In 2015, Mr. Potente spent time in Lesvos, Greece. *See* Ex. 6, Ralph Potente Facebook Profile;
<https://www.facebook.com/profile.php?id=100000627068768&lst=58702590%3A100000627068768%3A1543991551&sk=about§ion=bio>.

39. Mr. Potente visited the Pacific Northwest to hand-select trees that an artisan whittled into a genius of sacred geometry before shipping it to Long Island for [his] architectural plans. *See* Ex. 6, Ralph Potente Facebook Profile; <https://www.facebook.com/profile.php?id=100000627068768&lst=58702590%3A100000627068768%3A1543991551&sk=about§ion=bio>.

40. Innate never received consent from anyone to receive advertisements by facsimile. *See* attached Exhibit 7, Rule 30(b)(6) Deposition of Innate Intelligence Corporate Representative, Gary Eyler; June 15th, 2017, 139:4-140:13.

41. Innate never made any efforts to determine whether or not it had an existing relationship with anyone to whom it sent the subject fax. *See* attached Exhibit 7, Rule 30(b)(6) Deposition of Innate Intelligence Corporate Representative, Gary Eyler; June 15th, 2017, 142:9-13.

42. Innate never had any policies or procedures regarding checking the recipients of the subject faxes to see if there were any relationships with those people prior to transmission. *See* attached Exhibit 7, Rule 30(b)(6) Deposition of Innate Intelligence Corporate Representative, Gary Eyler; June 15th, 2017, 142:14-17.

43. Innate purchased the list of fax numbers to which the subject fax was sent from Fax List Wholesalers. *See* attached Exhibit 7, Rule 30(b)(6) Deposition of Innate Intelligence Corporate Representative, Gary Eyler; June 15th, 2017; 44:3-9; Exhibit 8, Innate Intelligence Document Production, II000128-130.

44. The Subject Fax promoted a “Lunch N’ Learn” or “LnL” service. *See* attached Exhibit 9, Fax of 7/5/2016 11:09:11 am.

45. Innate considered these “Lunch N’ Learns” to be “sales opportunities”. *See* attached

Exhibit 7, Rule 30(b)(6) Deposition of Innate Intelligence Corporate Representative, Gary Eyler; June 15th, 2017, 59:15-20.

46. Innate's intent with the "Lunch N' Learn" program was that businesses who would accept the offer for the "Lunch N' Learn" programs would implement a full wellness program which would involve staffing the office with doctors. *See* attached Exhibit 7, Rule 30(b)(6) Deposition of Innate Intelligence Corporate Representative, Gary Eyler; June 15th, 2017, 60:4-61:5.

47. Innate would make between \$100 to \$300 from chiropractors who would attend the "Lunch N' Learns" at local businesses. *See* attached Exhibit 7, Rule 30(b)(6) Deposition of Innate Intelligence Corporate Representative, Gary Eyler; June 15th, 2017, 59:24-60:3.

48. The fliers sent to Profax for broadcast did not contain opt-out notices. *See* attached Exhibit 8, Innate Intelligence Document Production, II000164-193.

49. Profax placed the following language the subject fax: "To opt out from future faxes, go to www.removemyfaxnumber.com and enter PIN# 17204, or call 800-321-4433. The recipient may make a request to the sender not to send any future faxes and that failure to comply with the request within 30 days is unlawful." *See* attached Exhibit 9, Dft. Innate's Resp. to Pls.' 2nd Req. for Admissions, No. 1; Exhibit 7, Rule 30(b)(6) Deposition of Innate Intelligence Corporate Representative, Gary Eyler; June 15th, 2017, 141:9-14.

50. Profax supplied the following language the subject fax: "To opt out from future faxes, go to www.removemyfaxnumber.com and enter PIN# 17204, or call 800-321-4433. The recipient may make a request to the sender not to send any future faxes and that failure to comply with the request within 30 days is unlawful." *See* attached Exhibit 9, Dft. Innate's Resp. to Pls.' 2nd Req. for Admissions, No. 2, Exhibit 7, Rule 30(b)(6) Deposition of Innate Intelligence

Corporate Representative, Gary Eyler; June 15th, 2017, 141:9-14.

51. Profax created the following language the subject fax: “To opt out from future faxes, go to www.removemyfaxnumber.com and enter PIN# 17204, or call 800-321-4433. The recipient may make a request to the sender not to send any future faxes and that failure to comply with the request within 30 days is unlawful.” *See* attached Exhibit 9, Dft. Innate’s Resp. to Pls.’ 2nd Req. for Admissions, No. 3, Exhibit 7, Rule 30(b)(6) Deposition of Innate Intelligence Corporate Representative, Gary Eyler; June 15th, 2017, 141:9-14.

52. Profax instructed Innate to include the following language the subject fax: “To opt out from future faxes, go to www.removemyfaxnumber.com and enter PIN# 17204, or call 800-321-4433. The recipient may make a request to the sender not to send any future faxes and that failure to comply with the request within 30 days is unlawful.” *See* attached Exhibit 9, Dft. Innate’s Resp. to Pls.’ 2nd Req. for Admissions, No. 4.

53. Profax managed the opt-out list for Innate. *See* attached Exhibit 10, Email from Profax Corporate Representative Andrew Barnett, Jan. 24, 2017.

54. ProFax represented to Innate that the opt-out language placed on the Subject Faxes was compliant with the TCPA. *See* Exhibit 7, Rule 30(b)(6) Deposition of Innate Intelligence Corporate Representative, Gary Eyler; June 15th, 2017, 39:1-4.

55. Lance Levine was unfamiliar with Fax List Wholesalers prior to the filing of the instant case. *See* Exhibit 11, Rule 30(b)(6) Deposition of Levine Hat Co. Corporate Representative, Lance Levine, August 27, 2018, 135:1-13).

Respectfully submitted,

KEANE LAW LLC

/s/ Steven Duke

Ryan A. Keane, #MO62112
Steven W. Duke #MO68034
7777 Bonhomme Ave, #1600
St. Louis, MO 63105
Phone: (314) 391-4700
Fax: (314) 244-3778
ryan@keanelawllc.com
steve@keanelawllc.com
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed via the Court's Electronic Filing System this 22nd day of February, 2021, which will send a notice of electronic filing to all counsel of record.

/s/ Steven Duke